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## ***Save Ourselves: The Environmental Case That Changed Louisiana***

*Oliver A. Houck\**

You can drive the interstate from New Orleans to Baton Rouge, Louisiana in about an hour, or you might take the River Road. In that same hour's time you will emerge from cane fields and chemical plants into the town of Burnside; its stores, a school, and a row of frame houses. Out across the way is an old slave quarters converted to a restaurant called The Cabin and run by a family named Robert. But for the Roberts, you would also be driving by the largest hazardous waste disposal facility in the state, perhaps the country. Or, as the Governor claimed, the world.

The Roberts were alarmed by the prospect. With a friend, a retired nurse, they formed a small group called Save Ourselves. Because, as they saw it, no one else would. Many years later, after a journey that seemed several times to leave them dead by the roadside, the case of *Save Ourselves* would make Louisiana legal history and revolutionize environmental decision making in the state.<sup>1</sup> The landscape would never be the same.

Nothing in the *Save Ourselves* outcome was foreordained. The odds for winning were slim. The odds of making new law were beyond imagination. Had this case not occurred, it is doubtful that another would have come along to replicate it. The *Save Ourselves* opinion arose from disparate sources, each of them human, each operating on its own logic, up to a massive and prolonged collision.

We could, of course, continue to read and practice law effectively without knowing anything about *Save Ourselves* other than the requirements it left behind and mark its passage. We would be much the poorer, however, because the story of this case says so much about Louisiana's difficult marriage with the notion of environmental protection and what it takes for this protection, even today, to work. At bottom it requires people, which is where this story begins.

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\* Professor of Law, Tulane University. The research assistance of Claire Yancey, Tulane Law School '10, and Roman Griffith, '11, is acknowledged with gratitude.

1. *Save Ourselves v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152 (La. 1984).

## I. THE CALL

It started with a telephone call from Ruby Cointment, an old friend, who had been reading the morning paper.<sup>2</sup> Theresa Robert, a 26-year-old housewife with a house trailer to keep, a small restaurant to run, and a three-year-old loose on the floor did not have time for the paper, but she could tuck the telephone receiver under her ear and keep on with the dishes. “Honey,” she asked, “they going to do *what*?” Ruby said, “they going to build a toxic waste dump by you, barges coming in off the river and all.” She paused, reading ahead, and then added, “it’s going to be the biggest in the world.”<sup>3</sup>

Ascension Parish lies south of Baton Rouge along the Mississippi River, its landscape capturing Louisiana’s transition from a plantation economy to a new one based on oil, gas, and chemicals. At their peak, columned dwellings in all shapes and colors lined the river from the capital city to New Orleans, a grand promenade for the steamboats passing by.<sup>4</sup> The Civil War, however, broke the back of the sugar economy. By the end of the war, the number of plantations had dropped from 1,400 to less than 200, most of these on the road to decay.<sup>5</sup> One hundred years later the best living examples still standing—Tezcuco, Houmas House, San Francisco, Nottoway—were found in and around Ascension, shoulder to shoulder with chemical plants and oil refineries, a new kind of plantation culture that made the air smell funny from time to time and left dead fish on the surface of bayou waters. Slowly and unwillingly, a state deeply dependent on petrochemicals began recognizing that their byproducts were dangerous and that dumping them wherever convenient was not a good solution. With this recognition, however, came a golden prospect.

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2. Interview by Claire Yancey, with Theresa Robert, Al Robert, and Al Robert, Jr. in Burnside, La. (October 23, 2008) [hereinafter Robert Interview]. The quotations that follow are taken from this interview.

3. See Sonny Albarado & Penny Perkins, *Waste Unit Set on Site for Airport*, MORNING ADVOCATE (Baton Rouge), Oct. 18, 1979, at 1-B (“Ascension Parish Police Jury President Vincent ‘Cy’ Tortorich Responded with a shocked ‘What!’ when told Wednesday that property his parish and East Baton Rouge Parish were considering for an airport location will be used instead for the world’s largest chemical waste treatment complex.”).

4. *The River Road*, WWW.NPS.GOV, <http://www.nps.gov/nr/travel/louisiana/riverroad.htm>. (last visited March 19, 2011).

5. John McQuaid, *Transforming the Land*, TIMES-PICAYUNE, May 21, 2000, <http://www.nola.com/speced/unwelcome/index.ssf?/speced/unwelcome/stories/0521transforming.html>; Mary Gehman, *Touring Louisiana’s Great River Road*, available at [http://margaretmedia.dawesbiz.net/river\\_road/intro.htm](http://margaretmedia.dawesbiz.net/river_road/intro.htm) (last visited April 12, 2011).

The problem was pressing. U.S. industries in the early 1980s were generating around 600 billion pounds of hazardous waste each year—roughly one million pounds per minute.<sup>6</sup> The State of Louisiana, 31st of the states in size, led the nation in hazardous waste production,<sup>7</sup> with over 16,000 pounds for every person in the state—much of it discharged directly into the river or in open pits and underground cavities, eventually finding its way into local wells, swamps and streams. At the time the Save Ourselves lawsuit was coming on, there were close to 3,000 water discharge permits for 183 million tons of waste a year in Louisiana, most of it into the Mississippi River below Baton Rouge, the drinking water source for nearly 1.5 million people.<sup>8</sup> Jefferson Parish estimated that over 213 million pounds of 50 different toxic chemicals passed by its water intake pipes each year.<sup>9</sup> The contamination of the New Orleans water supply became so notorious that it prompted passage of the federal Safe Drinking Water Act.<sup>10</sup> Researchers at the time also noted striking correlations between consumers of Mississippi water and certain forms of cancer, including rectal cancer, which they explained by the rectum's function in the resorption of water.<sup>11</sup> The chemical industry denied any connection.<sup>12</sup>

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6. PAT COSTNER & JOE THORNTON, *WE ALL LIVE DOWNSTREAM: THE MISSISSIPPI RIVER AND THE NATIONAL TOXICS CRISIS*, 91 (1989).

7. *Id.* As of 2008, Louisiana was ranked first in the nation for the quantity of hazardous waste produced, and 15<sup>th</sup> in the total number of hazardous waste producers. AMERICAN SOCIETY FOR CIVIL ENGINEERS, *Report Card for America's Future, Louisiana*, <http://www.infrastructurereportcard.org/state-page/louisiana> (last visited Oct. 18, 2011).

8. *See* COSTNER & THORNTON, *supra* note 6, at 91.

9. *Id.* at 93.

10. JAMES L. AGEE, ENVTL. PROT. AGENCY, *PROTECTING AMERICA'S DRINKING WATER: OUR RESPONSIBILITIES UNDER THE SAFE DRINKING WATER ACT* (1975), available at <http://www.epa.gov/aboutepa/history/topics/sdwa/07.html>. Environmental Protection Agency studies in the 1970s found, respectively, 46 and 66 toxic and potentially toxic chemicals in New Orleans and regional water supplies, while another survey found such high risk toxins as carbon tetrachloride, chloroform, benzene, trichloroethylene and bromoform. *See* Oliver Houck, *This Side of Heresy: Conditioning Louisiana's Ten-Year Industrial Tax Exemption Upon Compliance with Environmental Laws*, 61 TUL. L. REV. 289, 314 (1986) (citing ENVTL. PROT. AGENCY, *DRAFT ANALYTIC REPORT: NEW ORLEANS AS A WATER SUPPLY STUDY* (1974) and ENVTL. PROT. AGENCY, *PRELIMINARY ASSESSMENT OF SUSPECTED CARCINOGENS IN DRINKING WATER: REPORT TO CONGRESS* (1975)).

11. *See* Houck, *supra* note 10, at 315–316 (citing GOVERNOR'S TASK FORCE ON ENVIRONMENTAL HEALTH, ENVIRONMENT AND HEALTH IN LOUISIANA: THE CANCER PROBLEM 165–66 (1984); *Cancer Risk Higher From Drinking River Water, Study Shows*, MORNING ADVOCATE (Baton Rouge), Apr. 25, 1985 (Supp.) (*Prosperity in Paradise? Louisiana's Chemical Legacy*) at 10, col. 1; Interview with Dr. Marise Gottlieb, Tulane University (Apr. 2, 1986)).

Hazardous waste landfill disposal in the state was also booming, with nearly one-third of the nation's storage capacity held in open lagoons, spread onto the land or injected into underground wells, where it by and large went off the radar.<sup>13</sup> Fewer than half of Louisiana's 3,000 injection wells had ever been inspected, and the inspections that did occur showed widespread problems.<sup>14</sup> State officials were unable even to "venture a guess" at the volume of oilfield waste injections, which were but one slice of the pie.<sup>15</sup> To this leviathan one could add nearly 200 chemical waste pits on private industrial sites, another 20,000 "non hazardous" oilfield pits, and rampant "midnight" dumping.<sup>16</sup> As a state official in that era observed, "all it took was a backhoe."<sup>17</sup>

All of which is to say that Louisiana, its popular governor, Edwin Edwards, and Ascension Parish had a bona fide problem on their hands. For the Governor, it was all opportunity. The state could develop the capacity not only to manage its own wastes but to provide this service to the nation as well.<sup>18</sup> It would be a virtual

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12. *Industry, Cancer Link Unproved*, MORNING ADVOCATE (Baton Rouge), Apr. 25, 1985 (Supp.) (*Prosperity in Paradise? Louisiana's Chemical Legacy*) at 8, col. 1 (quoting Fred Loy, President of the Louisiana Chemical Association, saying "I'm tired of having to address the issue of cancer and the chemical industry, when there is no evidence that they are related.").

13. R.D. Bullard, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY*, 66 (1990); Jason Berry, *The Poisoning of Louisiana*, SOUTHERN EXPOSURE, Mar.-Apr. 1984, at 16-17 ("With 80 waste injection wells, Louisiana has roughly 25 percent of all such wells in the United States.").

14. See Houck, *supra* note 10, at 324 (citing *Well Testers Overwhelmed*, MORNING ADVOCATE (Baton Rouge), Apr. 25, 1985 (Supp.) (*Prosperity in Paradise? Louisiana's Chemical Legacy*) at 15 (of approximately 3,000 injection well for wastes of all types, only half had been inspected and, of those, some thirty percent had problems)).

15. *Id.* at 325.

16. *State Faces Groundwater Problems*, MORNING ADVOCATE, Apr. 25, 1985 (Supp.) (*Prosperity in Paradise? Louisiana's Chemical Legacy*) at 14, col. 1; Houck, *supra* note 10, at 326 (citing *Loopholes Mask Groundwater Problems*, MORNING ADVOCATE (Baton Rouge), Apr. 25, 1985 (Supp.) (*Prosperity in Paradise? Louisiana's Chemical Legacy*) at 15, col. 1; Judice, *Hearing Monday on Oilfield Waste Rules*, TIMES-PICAYUNE/STATES-ITEM, Aug. 3, 1985, at B-1, col. 2.).

17. *Undiscovered Waste Sites Pose Threat to Water*, MORNING ADVOCATE (Baton Rouge), Apr. 25, 1985 (Supp.) (*Prosperity in Paradise? Louisiana's Chemical Legacy*) at 19, col. 1. A representative of the Office of Conservation states: "We know it's happening because we keep catching people." *Id.* (quoting Carroll Wascom, Office of Conservation).

18. Interview with Edmund ("Judge") Reggie in New Orleans, La. (August, 1982); Stella Pitts, *Waste Plant Opposed by Ascension Group*, MORNING ADVOCATE (Baton Rouge), Oct. 18, 1979 (on file with author).

captive market; waste production was booming and there was no place for it to go. Louisiana was already importing over 100,000 tons of toxic residuals from other states.<sup>19</sup> We simply needed to corral the parade.

Governor Edwards did nothing by halves. He wanted a national player to lead this initiative and sent Secretary of Natural Resources Jim Hutchinson to a waste conference in California, where he met representatives from the I.T. corporation and they apparently struck it off at once.<sup>20</sup> I.T. had been created a few years earlier as a waste cleanup operation but had expanded quickly into several disposal plants in California.<sup>21</sup> It had a reputation in the field. That was good enough for Hutchinson. The Governor had found his operator.

## II. THE COMING STORM

The Roberts were not looking for a fight. They had, in fact, just finished with a bruising episode in which Theresa's cousin Shelby had proposed to sell neighboring property for an Ascension Parish airport, with the existing Baton Rouge airport only 30 minutes up the highway.<sup>22</sup> Approved by the parish police jury, the proposal was eventually defeated by a referendum, leaving family and community scars all along the way.<sup>23</sup> Now came this proposal, and of all things it was cousin Shelby again proposing to sell the same land for the world's largest waste dump.<sup>24</sup> This was Theresa's home, the old slave quarters she and her husband had patiently restored into a small restaurant, the place she was raising her children. She saw no choice.

Ruby Cointment, for her part, had been a nurse at the cancer center M.D. Anderson in Houston for many years and had seen what she believed to be too many Louisiana children with strange

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19. Bullard, *supra* note 13, at 66

20. Al Robert, Jr., *The "IT Decision"*, LA. ENVTL. LAWYER, Summer 2004, at 2 (citing D. Eric Bookhardt, *A Magnet for Toxic Wastes*, FIGARO NEWSMAGAZINE, Mar. 17, 1980, at 5-6).

21. *Id.*

22. Robert Interview, *supra* note 2.

23. Albarado & Perkins, *supra* note 3, at 1-B.

24. Interview by Claire Yancey with William Fontenot, former member of the Louisiana Attorney General's Office, in Baton Rouge, La. (Sept. 21, 2008) [hereinafter Fontenot Interview]. Mr. Fontenot worked with the Roberts and other Louisiana citizens on access to information, law and other services relating to environmental quality.

ailments.<sup>25</sup> The I.T. proposal brought these children back to mind, which is why she had called Theresa that morning. Theresa had two youngsters and a third on the way.

Neither of the women were “environmentalists.”<sup>26</sup> Theresa Robert professed not to have yet heard the word. Further, she had not even known the plants nearby *had* hazardous wastes before she got involved.<sup>27</sup> The oil, gas, and chemical industry supported the little town of Burnside as it did the entire parish. Its workers constituted most of her customers at The Cabin. Theresa’s father had worked as a supervisor for the Agrico fertilizer plant across the river in Donaldsonville, and her husband and his family owned a fuel distributorship that ran between the Texaco refinery and local gas stations.<sup>28</sup> Ruby’s husband did survey work for plants up and down the river.<sup>29</sup> They were industry people.<sup>30</sup> But the I.T. proposal was different.

Looking around, they discovered that at least eight major hazardous waste disposal facilities were already in operation along the river in Ascension Parish, a small rectangle of about ten miles by thirty.<sup>31</sup> Three abandoned chemical dumps in the area had made the state’s Superfund list for priority cleanup, the most serious of the known super-problems.<sup>32</sup> To Louisiana officials, the Burnside location was logical—a lightly populated area in obvious need of hazardous waste disposal. To the Roberts, however, the location could not be more insensitive. It was within a mile of their town, and two miles from a predominantly black school with 233 students from kindergarten through eighth grade.<sup>33</sup> The facility would, furthermore, sit on top of a former Houma Indian Nation village and within a stone’s throw of three registered national landmarks including the St. Joseph’s School House, one of the first

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25. Robert Interview, *supra* note 2 (“She saw the children from Louisiana . . . she just always thought there was more children from Louisiana there than other states, and it really concerned her.”).

26. *Id.* (“The environmentalists were people that didn’t wash their hair, and they came in with babies on their backs, and sandals and barefooted.”).

27. *Id.*

28. *Id.*

29. Fontenot Interview, *supra* note 24.

30. Robert Interview, *supra* note 2 (“Industry put food on my table; industry took care of my family.”).

31. *Id.*

32. COSTNER & THORNTON, *supra* note 6 at 42.

33. Stella Pitts, *Purified wastes, or poison water? Disposal plant fighting rages on*, TIMES-PICAYUNE, Mar. 1, 1981, at 1-1 (on file with author) (Noting that Ascension Parish contains “three of the state’s most serious hazardous waste disposal sites.”).

Catholic schools in Louisiana established for people of color.<sup>34</sup> The 147-year-old Tezcucó plantation with a dozen small cottages, two museums, chapel and collection of 200-year-old oak trees was one of the last remaining crown jewels of its culture.<sup>35</sup> The Houmas House Plantation felt so threatened that it participated actively in the hearings to come and supported the Roberts in their legal actions.<sup>36</sup> As Theresa Robert, Ruby Cointment and an increasing number of locals saw it, the I.T. proposal was not a solution; it was an assault.

National news at the time was not comforting. Grim reports came from Love Canal in upper New York State, where thousands of tons of toxins were found beneath a suburban neighborhood, soon followed by scandals at Woburn, Massachusetts and Kentucky's Valley of the Drums.<sup>37</sup> An equally dark report came from Bayou Sorrel on just the other side of the Mississippi, where a young man named Curly Jackson opened the cock valve on a tanker full of hydrogen sulfide gas and was killed on the spot.<sup>38</sup> The toxins in Jackson's blood levels reached 3000 parts per million.<sup>39</sup> The Governor and the parish sheriff had claimed that he probably died of carbon monoxide instead.<sup>40</sup> The press had a field day. Hazardous waste was not looking like a friendly neighbor.

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34. *Historic school struck from national register*, ASSOCIATED PRESS, Feb. 26, 2011.

35. Dorothy Mahan, *People Power: Two Homemakers Win Landmark Environmental Decision*, PRESERVATION IN PRINT, Dec. 1992, at 16; *Historic School Struck From National Register*, SHREVEPORT TIMES, Feb. 26, 2011, <http://www.shreveporttimes.com/article/20110227/NEWS01/102270319/Historic-school-struck-from-national-register>.

36. Stella Pitts, *Houmas House neighbor upsets residents*, MORNING ADVOCATE (Baton Rouge), Mar. 1, 1981 (quoting Houmas House owner Edwin Paul Crozat, who said "Our only hope is in the courts.") (on file with author); Sonny Albarado, *Dispute almost halts waste permit hearing*, MORNING ADVOCATE (Baton Rouge), at 1-B (on file with author). The Plantation also provided funding for key expert witnesses. Interview by Claire Yancey with Steve Irving in Baton Rouge, La. (November 21, 2008) [hereinafter Irving Interview].

37. See Sam Howe Verhovek, *After 10 Years, the Trauma of Love Canal Continues*, N.Y. TIMES, August 5, 1988, <http://www.nytimes.com/1988/08/05/nyregion/after-10-years-the-trauma-of-love-canal-continues.html>; JONATHAN HARR, *A CIVIL ACTION* (1996); James Bruggers, *Toxic Legacy Revisited: Valley of the Drums 30 Years Later*, COURIER-JOURNAL, December 14, 2008, <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20081214/NEWS01/81214001/Toxic-legacy-revisited-Valley-Drums-30-years-later>.

38. Fontenot interview, *supra* note 24.

39. *Id.*; see also *Rollins Env'tl. Services of La., Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127 (La. 1979) (holding parish ordinance passed in response to Curly Jackson's death unconstitutional).

40. Fontenot Interview, *supra* note 24.



That said, Theresa and Ruby were, at the time, an army of only two, and that was not going to suffice. They called a small meeting of friends. Not that many people could fit into the trailer, but one who did was Willie Fontenot, a member of the state Attorney General's office with the portfolio to help local groups and citizens understand their rights and the workings of the law.<sup>41</sup> Quiet, low-key, never pretending to be an expert in law or science, Fontenot had attended community meetings around the state for more than two decades, advising people how to get the information they needed, make requests of agencies, approach legislators, find experts, and speak at public hearings.<sup>42</sup> For all the things that private corporations hire law firms to do, while writing off their bills as routine business expenditures, Fontenot was the only public counterpart—a resource for hundreds of Louisianans sitting at some point in their own kitchens with no financial backing, no access to lawyers, and facing a project they found overwhelming.

Fontenot sat in the Roberts trailer on that evening, listening to the rise and fall of the conversation.<sup>43</sup> When all had had their say, he told them that they had the right to find out what was going on for themselves. They would want to organize themselves, starting with a name. Theresa and Ruby settled on "Save Ourselves" because, as they later explained, "if we didn't, nobody else was going to."<sup>44</sup> They had no idea how great the odds were against them doing any such thing.

### III. THE STATE STUDY

The state wanted to fast track the I.T. proposal. The quicker the approval, the less time for querulous outsiders to muddy the waters. Besides, the federal government, also awakening late to the phenomenon of widespread hazardous waste, had passed a national law imposing strict new requirements on treatment and storage facilities.<sup>45</sup> An early state approval could beat the start date for these new burdens. The Department of Natural Resources asked for a legislative resolution waiving state bid laws and allowing it to

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41. *Id.*

42. *Id.* For a fuller description of Mr. Fontenot's role, see BARBARA L. ALLEN, *UNEASY ALCHEMY: CITIZENS AND EXPERTS IN LOUISIANA'S CHEMICAL CORRIDOR DISPUTES* (2003).

43. Allen, *supra* note 42, at 38.

44. Robert Interview, *supra* note 2.

45. Mahan, *supra* note 35, at 16.

sole-source contract a waste management feasibility study.<sup>46</sup> Unfortunately for I.T., the resolution failed. No matter, it was easy enough to rig the selection process and, barring the unforeseen, there was still time to beat the federal timeline.

The study was a Louisiana hayride. I.T., which the Department had discovered in California, was invited to bid. Although it submitted the second highest bid in the solicitation,<sup>47</sup> won the award of \$385,000, apparently on the recommendation of a consulting firm called Research Associates of Louisiana, which was working closely with the Department on hazardous waste issues.<sup>48</sup> Indeed, it was directing them. As a later Ethics Commission would report, Research Associates was “fundamentally and comprehensively involved, virtually to the exclusion of the other Department of Natural Resources staff, in the development and management of the Department’s fledgling ‘Hazardous Waste Disposal Management Program.’”<sup>49</sup> This presented no particular ethical issues, but then I.T. sub-contracted with the same firm, Research Associates, to conduct its feasibility study as well.<sup>50</sup> At which point, Research Associates was in the enviable position of reviewing its own work when it came to the Department for approval.

The Hayride did not stop there. While the study was under way, I.T. was negotiating with Shelby Robert for the purchase of the Burnside tract, and had executed an option to purchase the tract within a week of presenting its feasibility study to the state.<sup>51</sup> Lo and behold, the feasibility study concluded that a single, mega-facility was needed for Ascension Parish and that the Burnside property was ideal in all characteristics for its location. At this point, I.T. had, in effect, sole-sourced not only the feasibility study but also the selection of its own project at its own site.

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46. See Sonny Albarado, *IT battling Nov. 19 deadline for Permit*, MORNING ADVOCATE (Baton Rouge), Oct. 30, 1980 (on file with author); see also Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (1976).

47. Albarado, *supra* note 48 (quoting an I.T. official as stating “we anticipated having a permit (from Louisiana) sooner than this . . . It’s quite important from an economic standpoint.”). Federal law would not only delay the project but also likely bring more stringent safety conditions, such as plant modifications and storage pit liners. *Id.*

48. Robert, *supra* note 20, at 3.

49. *I.T. Corp. v. Comm’n on Ethics for Public Emps.*, 453 So. 2d 251, 258 (La. Ct. App. 1st 1984).

50. See *I.T. Corp.*, 453 So. 2d at 252–53.

51. *Id.* at 258.

I.T. would eventually purchase the land for \$1.45 million.<sup>52</sup> Shelby Robert, who reportedly had paid \$450,000 for it some years earlier, apparently realized a million-dollar profit. His attorney, Vincent Sotile, a close associate of Governor Edwards, was often reported as, and later convicted of, having his own hand in such arrangements.<sup>53</sup> A few years later, Mr. Sotile went to federal prison for attempting to bribe a federal judge in another waste management lawsuit in Morgan City.<sup>54</sup> The Hayride continued.

None of these revelations, which would wind their way up to the Louisiana Ethics Commission and the state Supreme Court, turned out to be significant obstacles for the I.T.'s Burnside project. At the time Save Ourselves was forming, these indiscretions were not even known. As things turned out, however, the indiscretions played their role.

#### IV. THE LEARNING CURVE

The first step for Save Ourselves was simply to find out what was going on. Theresa, Ruby, and a few others began attending police jury and public meetings on the proposal, which seemed larger each time: an \$85 million dollar facility spread out over 1,000 acres with its own loading dock and road up from the river, a new form of plantation in itself.<sup>55</sup> Feelings of the Ascension Policy Jury were mixed. Some members feared the parish would be "transformed into an industrial wasteland for the nation,"<sup>56</sup> while others saw a new mega-facility as a way, given the existing range of dump sites already at hand, to "kind of clear up our situation."<sup>57</sup> None of them, however, liked having the proposal sprung on them by surprise, the first of several tactical errors I.T. would make along the way.<sup>58</sup>

As for the State and I.T., they viewed public involvement the same way: an animal best kept at bay. The only two potential difficulties with the proposal noted in the IT/Research Associates/DNR feasibility report were "public opposition and permit delays".<sup>59</sup> "If we give locals a vote," a DNR environmental

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52. I.T. Corp. v. Comm'n on Ethics for Public Emps., 464 So. 2d 284, 287 (La. 1985).

53. See *I.T. Corp.*, 453 So. 2d at 257.

54. Fontenot Interview, *supra* note 24.

55. See Alan Sayre, *Baton Rouge Judge Asks Not to be Censured*, TIMES-PICAYUNE, Apr. 15, 1995.

56. Pitts, *supra* note 18.

57. Albarado and Perkins, *supra* note 3, at 14-B.

58. Pitts, *supra* note 18.

59. Albarado and Perkins, *supra* note 3, at 1-B.

official said, “we’ll never find a place for it.”<sup>60</sup> I.T.’s Vice President labeled the nascent Save Ourselves as “a small, vocal minority who are simply unwilling to understand what we are trying to do,” concluding “the people are just going to have to trust us.”<sup>61</sup>

The more Save Ourselves looked at I.T.’s operation, the less trustworthy it seemed. For one thing, it was a moving target; the company appeared to be making up the project as it went along. An early description stated that it would dump an estimated 800,000 gallons of treated waste into the river daily, an amount I.T. assured would pose no threat to the area’s drinking water.<sup>62</sup> When local citizens objected that the discharge point was less than a mile upstream from the intake pipe for some 4,000 parish residents,<sup>63</sup> the treatment focus switched to something called “land farming,”<sup>64</sup> which Al Robert remembers thinking was some form of agriculture.<sup>65</sup> It was not. Rather, it turned out to consist of spreading the wastes out across the adjacent farmland (explaining the need for a 1,000-acre site), where it would presumably dry out and disappear.<sup>66</sup> Not surprisingly, people asked what happened when it rained, because the area was prone to heavy precipitation and annual floods.<sup>67</sup> At this point, land farming, too, dropped out of the discussion.

Instead, I.T. proposed to bind the hazardous waste in a kind of cement, which could then be safely buried and forgotten.<sup>68</sup> This is where the corporation made another tactical error. It had been dealing with a company called Chemfix in Jefferson Parish for this process, a company apparently well connected with Jefferson politicians who, in consequence, were naturally inclined to support the I.T. proposal.<sup>69</sup> I.T., however, apparently found a less expensive process called Surefix, leaving Chemfix out in the cold. The decision was doubtlessly logical to corporate officials in San Francisco, but, locally, the loss of Jefferson Parish support left Ascension, poor sister to its wealthier neighbor, to its own devices as more and more troubling questions poured in. There were

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60. Pitts, *supra* note 33.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*; Irving Interview, *supra* note 36.

66. Robert Interview, *supra* note 2.

67. Irving Interview, *supra* note 36.

68. *Id.*

69. *Id.* The description of the Chemfix process and its connection to Jefferson Parish Officials that follows is taken from this source.

suspicions that groundwater under the site connected with the Mississippi River. There were rumors that I.T. had experienced problems in California. I.T. then indicated that it would burn at least some of the waste in an incinerator.<sup>70</sup>

Facing skepticism, I.T. invited a small delegation, at its own expense, to visit its California facilities and see for themselves.<sup>71</sup> The invitation included Theresa and Al Robert of Save Ourselves, who agreed to go along but, despite the financial strain, insisted on paying their own way.<sup>72</sup>

The trip was a revelation. While Louisiana officials on the delegation enjoyed meetings with their counterparts and trips to wineries, the Roberts spent four days at the I.T. San Francisco bay area facility. They interviewed neighbors, largely poor workers of Mexican descent, and then the mayor and members of the area air quality management district, who had rather distinct views. Al Robert later described the plant as a "big joke." Its state-of-the-art technology consisted of the same "land farming" technique proposed for Burnside, plus an incinerator "no bigger than the one behind the local Food Mart and buildings recently spray painted with aluminum paint," apparently to make them appear modern. Al decided to rent a car and tour the facility on his own, down unpaved roads that the tour bus did not attempt, leaving a pregnant Theresa behind, at the advice of local residents. He discovered open pits with standing water and ponds overflowing with waste. The stench was "unbearable."

The interview with the air management district was no more encouraging. The facility was "a nightmare," they said, with pages of reported violations and lengthy court battles against I.T. Local news articles revealed that two of the evaporation ponds had been shut down following a year of odor complaints that resulted in an administrative hearing and an injunction against dumping any toxic chemicals.<sup>73</sup> A district inspector told Theresa that a waste

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70. *Id.*; see also Robert interview, *supra* note 2 (incineration proposal).

71. Sonny Albarado, *Area Group Still Opposes Waste Facility*, MORNING ADVOCATE (Baton Rouge), June 7, 1980 (on file with author).

72. Robert Interview, *supra* note 2. The description of the Robert trip that follows is taken from this source.

73. Albarado, *supra* note 71; CONTRA COSTA COUNTY HEALTH SERVS. DEP'T, CAL. DEP'T OF HEALTH SERVS., GBF/PITTSBURG LANDFILL SITE FACT SHEET #3, at 2 (May 1989) ("In 1971, Industrial Tank (now IT Corporation) subleased a portion of the site for disposal of liquid industrial waste. Ten ponds were constructed for this purpose. . . . In 1974, the *Central Valley Regional Water Quality Control Board* (CVRWQCB) determined that the site did not satisfy criteria for establishment of a hazardous waste facility. The Board ordered the closure of the site for hazardous materials and it was converted to a sanitary

operation of this type would need a “tremendous amount of watchdog activity,” and some “real valid enforcement” at the local level.<sup>74</sup> This one California district had 170 air quality employees; Louisiana had 30 for the entire state.<sup>75</sup>

Nonetheless, Louisiana and Ascension Parish officials returned with their minds unchanged. I.T. had experienced some problems, they agreed, but largely in the past. Save Ourselves was going to have to raise its concerns to another level, and that would require a lawyer. At which point the Roberts met Steve Irving, whom they later characterized as “a gift from God.”<sup>76</sup>

## V. THE PRECEDENT

Jurisprudence is not produced by spontaneous combustion. It is all about context, and just as human beings are shaped by their surroundings so are legal decisions, great and small. The Save Ourselves litigation arose from a series of very difficult lawsuits, each approaching the same, burgeoning hazardous waste phenomenon in Louisiana in a different way.

The first case involved an attempt by Iberville Parish, across the Mississippi River from Ascension, to curtail toxic waste flow into the community. The police jury began in 1975 with an ordinance prohibiting a local hauler for residential and commercial customers from disposing of hazardous wastes.<sup>77</sup> Three years later, Rollins Environmental Services bought a deep-well injection facility from an outfit known as “CLAW” (Clean Land and Water) along Bayou Sorrell for the disposal of industrial chemicals.<sup>78</sup> A month later, Curly Jackson died at an illegal dump site also operated by CLAW, at which point Iberville amended its existing ordinance to ban all toxic waste disposal in the parish.<sup>79</sup> The Louisiana Supreme Court would have none of it, declaring in a 1979 opinion—just as the “world’s largest waste facility” was announced for Ascension Parish—that a recent state waste management law had preempted the field and that Louisiana’s “prominent position” as one of the Nation’s “foremost producers”

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landfill (for nonhazardous garbage only).”), [http://www.envirostor.dtsc.ca.gov/regulators/deliverable\\_documents/9730939567/GBF%20FS%203.pdf](http://www.envirostor.dtsc.ca.gov/regulators/deliverable_documents/9730939567/GBF%20FS%203.pdf).

74. Albarado, *supra* note 71.

75. *Id.*

76. Robert Interview, *supra* note 2.

77. *See* Rollins Env’tl. Servs. of La., Inc. v. Iberville Parish Police Jury, 371 So. 2d 1127, 1129 (La. 1979).

78. *Id.*

79. *Id.*

of toxic wastes “crie[d] out against the prospect” of local prohibitions.<sup>80</sup> Overlooking the Court’s apparent enthusiasm for the state’s leadership in toxic waste production, the practical effect of the opinion was to relegate Louisiana parishes to an advisory role. As the I.T. case came on, Save Ourselves would have to look beyond the parish authority.

Also in the early 1970s, a Petro Processors waste facility came under fire in East Baton Rouge Parish, just north of Ascension; large, open pits at the property boundary were leaking onto neighboring lands that included cattle fields and the formerly pristine Devil’s Swamp.<sup>81</sup> The neighbors, the Ewell family, found their soils saturated with a suite of chlorinated hydrocarbons: toxic, bio-accumulative chemicals. They brought a civil case for restoration of their land, estimated to cost over \$170 million.<sup>82</sup> Although the source of the contamination was virtually uncontested, the extent of it was muddled at trial, and the jury awarded a small fraction of the requested amount, \$30,000, barely covering plaintiff’s costs in bringing the case.<sup>83</sup> Although the award was increased to \$200,000 on appeal, no cleanup was ordered.<sup>84</sup> Further attempts to secure it also failed.<sup>85</sup> The lesson of the Petro Processors litigation was that civil actions were unlikely to remedy a hazardous waste problem once it was discovered. Citizens at risk of exposure needed to intervene at the front end.

This lesson was brought home in yet another set of cases, arising again in East Baton Rouge and, coincidentally, against the same Rollins Environmental Services that had emerged victorious from the Iberville litigation.<sup>86</sup> The waste facility this time was an active one, and relied on the now familiar practice of “land farming” and incineration.<sup>87</sup> The effects of this operation on a predominantly black neighborhood were similar to those described by the Mexican neighbors of I.T.’s facility in California. Mary McCastle, a 72-year-old grandmother and leader of the Rollins fight, said:

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80. *Id.* at 1132.

81. *Ewell v. Petro Processors of La., Inc.*, 364 So. 2d 604, 605 (La. Ct. App. 1st 1978).

82. *Id.* at 608.

83. *Id.* at 604.

84. *Id.* at 609.

85. *See Ewell v. Petro Processors of La., Inc.*, 752 So. 2d 151 (La. 2000) (denial of writs).

86. *McCastle v. Rollins Envntl. Servs. of La., Inc.*, 456 So. 2d 612 (La. 1984).

87. *Id.* at 615.

We had no warning Rollins was coming in here. When they did come in we didn't know what they were dumping. We did know that it was making us sick. People used to have nice gardens and fruit trees. They lived off their gardens and only had to buy meat. Some of us raised hogs and chickens. But not after Rollins came in. Our gardens and animals were dying out. Some days the odors from the plant would be nearly unbearable. We didn't know what was causing it. We later found out that Rollins was burning hazardous waste.<sup>88</sup>

McCastle and her neighbors sued as a class action, claiming similar injuries from a similar cause. The district and appellate courts accepted the company's arguments that each injury was different and presented different medical issues. As a result, the cases would have to be tried individually.<sup>89</sup> In the course of these proceedings, however, poor and minority neighbors were finding their voices. Black people were coming to the hearings in busses.<sup>90</sup> The Louisiana environmental justice movement was being born.

At this point, three things important to Save Ourselves occurred. The first was a reversal by the Louisiana Supreme Court of the *McCastle* cases, finding that the plaintiffs were in fact similarly injured, by a single defendant, and that the rest was mere distraction.<sup>91</sup> The author of the opinion was Justice James Dennis. It was his first environmental decision. His opinion in *Save Ourselves* would follow that same year.<sup>92</sup> The second occurrence was the emergence of McCastle's trial attorney, Steve Irving, who had already entered the I.T. fray for Theresa Robert and Ruby Cointment. The third was that Save Ourselves members began to attend the lengthy and contentious state hearings over Petro Processors and the Rollins facility, educating themselves and comparing notes.<sup>93</sup> There were poignant moments. At one point, reading from her diary about dying cattle and dead crawfish ponds, Catherine Ewell lost her voice and a representative from the Department of Commerce and Industry got up and poured her a

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88. Bullard, *supra* note 13, at 57.

89. *McCastle v. Rollins Envtl. Servs. of La., Inc.*, 440 So. 2d 812, 815–16 (La. Ct. App. 1st 1983), *rev'd*, 456 So. 2d 612 (La. 1984).

90. Fontenot Interview, *supra* note 24.

91. *McCastle*, 456 So. 2d at 621.

92. By coincidence, the day Irving stood up to argue the I.T. case before the Louisiana Supreme Court, the (favorable) *McCastle* opinion was announced. Irving Interview, *supra* note 36. To Robert and Cointment, it seemed an omen from God. Robert Interview, *supra* note 2.

93. Fontenot Interview, *supra* note 24.



glass of water.<sup>94</sup> Whether this gesture is better viewed as heartfelt or tactical, McCastle, Ewell, and Robert *et al.* were having an emotional impact and imperceptibly changing the character of the game.

In the end, the *McCastle* plaintiffs, ground down by years of litigation, accepted a settlement offering each of them a few thousand dollars.<sup>95</sup> It was a financial win for the hazardous waste industry, but at a public price. It also confirmed that civil damage actions, coming after the fact of the harm, were not going to catch this train. Save Ourselves was going to have to directly challenge the state and I.T. permitting process.

## VI. THE PLAYING FIELD

Save Ourselves was facing a stacked deck. In 1980, as the first permit hearings came on, Louisiana's approach to environmental protection was still a game in motion. More than a dozen federal environmental laws came into effect in one heady spate between 1970 and 1976;<sup>96</sup> nearly all legislation since has been in fine tuning these programs and trying to get buy-ins from the states. State programs, for their part, have been spotty, some outperforming the federal government with regularity and others resisting to the wall. The Pelican State started out somewhere between resistance and denial. Even when denial shut off free money to remediate abandoned and leaking hazardous waste sites, for example, Louisiana refused to propose them for federal cleanup lest they

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94. *Id.*

95. Bullard, *supra* note 13, at 58.

96. For a partial, but breathtaking, list, see Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 42 U.S.C. §§ 7401-7671g (2006); Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1466 (2006); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. §§ 9601-9675 (2006); Federal Insecticide, Fungicide, and Rodenticide Act of 1972, Pub. L. No. 92-516, 86 Stat. 987, 7 U.S.C. § 136-136y (2006); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1787 (2006); Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 42 U.S.C. §§ 1251-1387 (2006); Forest and Rangeland Renewable Resources Policy Act of 1974, 16 U.S.C. §§ 1601-1687 (2006); Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445 (2006); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321-4375 (2006); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795, 42 U.S.C. §§ 6901-6992k (2006); Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660, 42 U.S.C. §§ 300f-300j(26) (2006); Toxic Substances Control Act of 1976, Pub. L. No. 94-469, 90 Stat. 2003, 15 U.S.C. §§ 2601-2692 (2006).

tarnish the image of industry in the state.<sup>97</sup> At the time that the I.T. hearings were in progress, an Assistant State Attorney General wrote that Louisiana's clean air law was not written to be enforced. Rather, he said "it was in the interest of Louisiana manufacturers to create just enough of a state regulatory presence to keep the federal government out."<sup>98</sup>

The State's stance toward groups like Save Ourselves, therefore, was not instinctually friendly. It too, however, was in flux. For much of the 20<sup>th</sup> century, as oil, gas, and chemical industries were transforming the landscape, state environmental responsibilities vested as an afterthought within a few agencies principally devoted to other missions.<sup>99</sup> The Department of Wildlife and Fisheries monitored water quality, for example, while, anomalously, an ad hoc-looking Stream Control Commission set water quality standards.<sup>100</sup> Department of Health officials were asked to maintain the "purity" of air quality by "balancing" the protection of health with "maximum employment and the full industrial development of the State."<sup>101</sup> The Department's priorities were rather clear. By the mid-1970s, facing a wave of new national programs, it became apparent that the state would need to do more.

In 1974, Louisiana amended its constitution to include a new provision declaring that "the air and water, and the healthful, scenic, historic and esthetic quality of the environment shall be protected, conserved and replenished," and directing the legislature to enact laws to this end.<sup>102</sup> A year later the lawmakers created an Office of Environmental Quality within DNR.<sup>103</sup> In 1979, as news of the I.T. proposal was breaking, the legislature replaced the old

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97. See Fontenot Interview, *supra* note 24 (when federal funding was first available under the "Superfund" program, the state initially declined to identify potential sites in order to avoid their "stigma").

98. Bob Anderson, *La. Air Pollution Law Said to Be Unenforceable*, SUNDAY ADVOCATE (Baton Rouge), Nov. 26, 1978, at 7-B, col. 1 (quoting Richard Troy, La. Assistant Att'y Gen. on Env'tl. Matters).

99. See Charles S. McCowan, Jr., *The Evolution of Environmental Law in Louisiana*, 52 LA. L. REV. 907, 909 (1992). The description of the evolving Louisiana regulatory framework is largely taken from this source. By coincidence, Mr. McCowan represented I.T. throughout the *Save Ourselves* proceedings.

100. *Id.* at 910–11.

101. *Id.* at 911.

102. LA. CONST. art. IX, § 1. This article elaborated on a provision of the 1921 Constitution declaring that the "natural resources" of the state were to be protected and directing the legislature to enact implementing laws. LA. CONST. art. IV, § 1 (amended 1974).

103. See LA. REV. STAT. ANN. § 36:358–59 (Supp. 2011).

Stream Control Commission with a similar looking and equally unwieldy creature, the Environmental Control Commission (ECC), in charge of pollution discharge permits.<sup>104</sup> Like its predecessor, the Commission was governed by the heads of state agencies (e.g. Agriculture, Commerce and Industry, Public Works), all but one of whom served at the pleasure of the Governor, and each with a statutory mission that regularly conflicted with environmental protection. This was the scene when that same year, I.T., by legerdemain, orchestrated the approval of its own waste management facility in Burnside, Louisiana, subject only to discharge permits from the newly-created ECC. As the action wound forward, the ECC would be abolished and its functions transferred to yet another new agency, the Department of Environmental Quality,<sup>105</sup> which, as it turned out, would end up making the final call.

The ECC differed from its predecessor little more than in name. It was no friend of Save Ourselves, but it was required to hold hearings, and that was all Steve Irving could ask.

#### VII. THE PERMIT AND ETHICS HEARINGS

Environmental lawsuits are rarely a one-shot event. They often begin with administrative hearings that can range from court-like trials with formal rules and contested testimony to the show-up-at-the-microphone affairs of a city planning board that basically allow people to blow off steam. In this case, following DNR's acceptance of its proposal, I.T. had to run both gauntlets, starting with a public audience before the new ECC. Time was pressing, as the new and more stringent requirements of federal law would kick in within three months.

In July of 1980, the first public hearings were held in Ascension Parish. More than 500 residents showed up, many speaking passionately against the project.<sup>106</sup> They already suffered from a disproportionate burden of toxic waste. The company's assurance that it would not accept wastes from out of state appeared to be non-binding, and if made binding by state permit, unconstitutional as well.<sup>107</sup> Local citizens had difficulty

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104. See LA. REV. STAT. ANN. § 30:2001–2396 (2000 and Supp. 2011).

105. Act. No. 97, 1983 La. Acts 272.

106. Sonny Albarado, *Opponents of Waste Plant Pit Emotions Against Rules*, MORNING ADVOCATE (Baton Rouge), Aug. 1, 1980.

107. At one point, Irving represented that several of his clients would abandon their opposition to the plant if it would commit to accept only hazardous waste from sources within the state. Albarado, *supra* note 36 at 4B; see also Pitts, *supra* note 33, at 1-6 (quoting Attorney General William Guste

understanding the company's proposal, which kept on changing, much less its safety assurances.<sup>108</sup> One testified that the death of even one child would be unacceptable.<sup>109</sup> Who would be willing to disagree? As might be expected, they made little impression on the corporation, which expressed surprise that "the people in Louisiana don't trust their state officials,"<sup>110</sup> nor on the DNR official in charge, who, with apparent candor, suggested to the press that local opposition would have little impact.<sup>111</sup> True as that might have been with respect to the state's decision, it overlooked the political impact of that first hearing. Shortly following, the Ascension Parish Police Jury, which had been a divided but reluctant backer of the project, withdrew its support.<sup>112</sup> Five hundred people in a small community can make a difference.

A few weeks later the ECC opened its formal, adjudicative hearing on the I.T. project, and the real show began. Save Ourselves's attorney had two objectives.<sup>113</sup> The first was to show that there were serious questions here and that, at the least, DNR had not done nearly enough to ask or answer them. Knowing that the cards were stacked against him and that the ECC was composed of some of the most powerful figures in state government, the other objective was to provide space for new information, media attention, inquiries from legislators, criticism from police jurors, fluctuating market conditions, and other investment options to slow the train down. Theresa Robert remained on the phone in her trailer kitchen, the high heels on her pumps pounding sharp circles into the floor, talking to reporters, arranging cookie sales, and recruiting new members. Save Ourselves would grow to several thousand, convinced that the world's largest hazardous waste facility at Burnside was a very bad idea.

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that he did not think I.T.'s "letter of intention" would stand up in court, and a permit with such a limit would in all likelihood violate the Interstate Commerce Clause of the Constitution).

108. Pitts, *supra* note 33, at 1-6 (quoting Ruby Cointment, who said "there is simply no way we can trust them to do what they [I.T. Corporation] have said they will do.").

109. See Albarado, *supra* note 106 (quoting the comments of Mrs. Joyce Haydel).

110. Pitts, *supra* note 33 (quoting I.T. Vice President Peter Williamson).

111. *Id.* (quoting the Assistant Secretary of the Office of Environmental Affairs Jim Porter who said, "[I]f we give locals a vote, we will never find a place to build it."). State officials accused local opponents of the proposal of the "excessive emotionalism," adding more fuel to the fire. *Id.*

112. Robert, *supra* note 20, at 3.

113. Irving Interview, *supra* note 36.

The formal hearings began in September of 1980. They would continue for 18 meetings before the Commission alone, with 150 hours of testimony, over 100 exhibits, and a record that grew into thousands of pages, for another ten years.<sup>114</sup> On one side were the Commission members, the DNR staff and some of the highest-end law firms I.T. could retain. On the other side was Steve Irving, in solo practice, with no ambitious law clerks at his command and no partners to pick up the slack, already over-committed to the McCreary case and the Rollins hearings, and with no means of funding even the filing of pleadings, to say nothing of fees. In addition to these challenges that would defeat all but the most committed attorney, Irving faced one more. His clients might be passionate about their cause, but they had no expertise. The I.T. issues involved chemistry, engineering, hydrology, geology, biology, cancer, exposure pathways and risk analysis, each one a mind-numbing mystery for someone trained, instead, in law. The permits themselves were so complicated they required training even to read them, much less to critique them. Irving not only lacked experts to gainsay the project, he did not even have assistants who knew what questions to ask. At this point, he received a gift from God. In fact, he received two of them. They changed all the dynamics.

As the formal hearings began, Irving was approached by Bentley Mackie who was an employee of the Police Jury Association of Louisiana, a lobby for police juries with state and federal officials.<sup>115</sup> Mackie was not only wired to state and local politics but also to the local hazardous waste industry, particularly the Chemfix proponents who had lost out with I.T. not long before.<sup>116</sup> According to Irving, there were several local industries that saw I.T. as a rogue operator, or as unwanted competition, or both, and were happy to see the project challenged at the ECC. Mackie, pipelining technical and political expertise into the Save Ourselves case, became an invaluable asset in understanding the Chemfix process, the hazards of land farming, and the nature of subsurface geology that would become a critical, indeed pivotal, issue. With this knowledge in his corner, Irving was able to turn the hearings into an open discovery process, asking questions to which he knew the state had few if any answers, all of which would take time to explore and resolve.

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114. Robert, *supra* note 20 at 3.

115. Irving Interview, *supra* note 36; Fontenot Interview, *supra* note 24.

116. Irving Interview, *supra* note 36. The description of Mr. Mackie's assistance that follows is described by this source.

This was, of course, I.T.'s greatest fear. It needed to get its state permits within a matter of weeks before federal law kicked in and complicated things enormously.<sup>117</sup> I.T.'s most outspoken proponent on the Commission, the Commissioner of Agriculture Bob Odom, told Save Ourselves, which had just been joined by the antebellum plantation Houmas House, that he would brook no delay. "We're not going to give you two weeks," he warned the attorneys.<sup>118</sup> Seeing, nonetheless, the process drag forward, I.T. came up with the idea of an "interim permit," approving the project pending further review, which it hoped would satisfy the federal government that the facility was pre-approved and therefore exempted from the new federal program.<sup>119</sup> Odom made his motion to the full Commission before Irving had had the opportunity to present his first witness, which seemed a little rough even by Louisiana rules.<sup>120</sup> The Department of Wildlife and Fisheries representative took the unusual step of opposing the motion, explaining that, while he could not put his finger on the problem, it didn't seem right.<sup>121</sup> The motion lost, four to three.<sup>122</sup>

Around this time, Irving received a tip from Mackie that Odom had received a \$25,000 "campaign loan," as yet unpaid, from Shelby Robert, who was looking forward to a handsome profit from the sale of his property to I.T.<sup>123</sup> It seemed a rather obvious conflict of interest and Irving lost no time requesting an investigation by the State Ethics board.<sup>124</sup> This created a new sideshow and more adverse publicity. Odom eventually defeated the ethics charges,<sup>125</sup> but they left an odor that tainted both I.T. and the ECC. The controversy also galvanized I.T. into acting on its option agreement with Shelby Roberts, before the ethics proceedings could question it and perhaps scare him away.<sup>126</sup> The company paid out its \$1.45 million and took title to the property. As Irving saw it, I.T. made the mistake of paying its money before

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117. Albarado, *supra* note 46.

118. Albarado, *supra* note 36.

119. Albarado, *supra* note 46.

120. *Id.*

121. Irving interview, *supra* note 36.

122. Memorandum of Claire Yancey, "Save Ourselves," undated, at 32 (on file with author). The ECC then granted I.T. a "pre-construction permit," hoping that it would beat the RCRA deadline. See Roberts, *supra* note 20, at 13, n.60 (citing Steven Wheeler, *I.T. Receives OK to Begin 'PreConstruction Activity'*, MORNING ADVOCATE (Baton Rouge), October 30, 1980).

123. See *Odom Got Loans From IT Site Owner*, MORNING ADVOCATE (Baton Rouge), Oct. 2, 1980.

124. Irving Interview, *supra* note 36.

125. *Id.*

126. *Id.*

the deal was done. Then again, at this early stage of the process, the deal still looked very much done; it was still only a matter of going through the motions.

Then came the second act of God, another player from an unexpected quarter with more game-changing information.<sup>127</sup> Dale Givens was a water quality specialist in DNR's Office of the Environment, and later became Secretary of its successor agency, the Department of Environmental Quality. According to Irving, Givens was a military, chain-of-command man who did not like the fact that I.T. and Research Associates had commandeered the DNR waste management study and the Burnside site approval. Both from a sense that this was not good government and a more particularized sense that his department had been hijacked,<sup>128</sup> Givens approached Irving in confidence and disclosed first-ever information on the relationships between I.T., Research Associates, and DNR. Lacking resources to pursue it, Irving quickly turned over the information to an investigative reporter of the Baton Rouge Morning Advocate, who had a field day.

As the details came out, Irving moved again for an inquiry by the State Ethics Board into the timing of I.T.'s property purchase while it was ostensibly studying the site's feasibility for DNR. He also raised the conflicts that Research Associates presented within DNR itself, responsive to both I.T. and the agency.<sup>129</sup> The more one looked, such coincidences of interest seemed routine. At one point, the I.T. permit application was supported by the report of a Louisiana State University geologist that found no problems with subsurface strata. When it turned out that this geologist was also working for Research Associates, which was, in turn, reviewing the permit, he explained he could be perfectly impartial while evaluating his own work.<sup>130</sup> The notion of conflicts seemed missing from the gene pool.

Irving's ethics charges here were more serious and more directly impugning to I.T. than the Odom campaign donation. They led to administrative hearings and then additional, prolonged litigation involving I.T., Research Associates, and DNR personnel.

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127. *Id.* The description that follows of the assistance of Mr. Givens, who has retired from public service, is taken from this interview.

128. *See supra* text accompanying notes 47–50 (Research Associates involved “virtually to the exclusion” of DNR staff); Mr. Givens recalls that Ned Cole, President of Research Associates, even had his own key to the offices and would come in, unsupervised, on weekends. Telephone Interview with Dale Givens (April 27, 2011).

129. *See I.T. Corp. v. Comm’n on Ethics for Pub. Emps.*, 453 So. 2d 251 (La. Ct. App. 1st 1984).

130. Fontenot Interview, *supra* note 24.

That case was ultimately decided before the Louisiana Supreme Court the very year the Save Ourselves case finished its legal journey before the same justices.<sup>131</sup> I.T.'s contentions that it had no conflict of interest were found "unacceptable to the point of being ludicrous."<sup>132</sup>

The ethics ruling was limited in one key respect, however. The court decided that, ethics violations notwithstanding, it lacked the authority to void the contract.<sup>133</sup> The Burnside tract, so far as I.T. was concerned, remained all systems go, which left it with just one remaining problem: Save Ourselves.

### VIII. THE LITIGATION BEGINS

It was always going to come to a lawsuit. Irving knew better than anyone how prejudiced the ECC was against his client. He had seen it in the other waste cases, and these were the same players. His mission was to establish a record from which to appeal to the courts. In this effort, Irving, again, found two surprising allies, this time on the Commission itself.

The first was George Fischer from the Department of Health whose agency had been handling waste issues until the 1979 reorganization transferred this authority to DNR and its Office of Environmental Affairs.<sup>134</sup> Fisher, like Dale Givens in DNR, did not oppose the I.T. permit but he had reservations about the way it was, in effect, being railroaded. He told the press that he found Save Ourselves's concerns "legitimate, primarily because the I.T. proposal contained so few details."<sup>135</sup> "Too much had been left unexplained," he went on, "and I just don't believe the state had any business giving a permit to a firm which has not explained thoroughly what it intends to do."<sup>136</sup> Fisher went so far as to move the Commission to direct an independent study of the matter.<sup>137</sup> His motion lost, six votes to one, but each such proposal further tarnished the project and gained credibility for Save Ourselves.

Irving's second ally was George Kramer, the Department of Transportation representative on the ECC, who, being from an agency heavily engaged in construction across Louisiana, had

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131. See *I.T. Corp. v. Comm'n on Ethics for Pub. Emps.*, 464 So. 2d 284 (La. 1985).

132. *Id.* at 257 (quoting findings of the Commission).

133. See *I.T. Corp.*, 453 So. 2d at 259.

134. Irving Interview, *supra* note 36.

135. Pitts, *supra* note 33.

136. *Id.* at 1-6.

137. *Id.*



access to geologists independent of DNR.<sup>138</sup> Together, Irving and Kramer presented evidence to the Commission that there were three levels of aquifers below the Burnside site, two of which were hydraulically connected to the Mississippi River.<sup>139</sup> This evidence was crucial. DNR's own hazardous waste management plan, written by Research Associates, required waste sites to be isolated "by natural or by created barriers" from both subsurface and surface waters.<sup>140</sup> Ironically, I.T. had called this isolation "one of the most important criteria" in site selection for a hazardous waste facility.<sup>141</sup> When at this ECC hearing Kramer moved for adoption of his hydraulic connection data as a fact, and additional facts on subsurface contamination from unknown sources, Irving held his breath. Perhaps, he later reminisces, in order to "throw us a bone" the ECC granted the motion.<sup>142</sup> At this point, he leaned over to Theresa Robert and whispered, "that killed the project."<sup>143</sup>

Not quite. The Commission voted to approve the permits with only one dissenting vote, attaching over two hundred findings of fact virtually all of which supported the project.<sup>144</sup> These findings also, however, contained the Kramer findings about the site contamination and connection to the River.<sup>145</sup> There they would lie, unperturbed as a buried waste drum until they were exhumed in court. Meanwhile, there were still three difficult appeals to go.

The first two lost. I.T. successfully argued before the 19th Judicial District Court<sup>146</sup> that Louisiana law prohibited a judge from overruling an administrative decision unless it contained "manifest error,"<sup>147</sup> a high bar only slightly short of "completely

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138. Irving Interview, *supra* note 36.

139. *Id.*

140. Robert, *supra* note 20, at 3.

141. *Save Ourselves v. La. Env'tl. Control Comm'n*, 430 So. 2d 1114, 1119 (La. Ct. App. 1st 1983).

142. Irving Interview, *supra* note 36.

143. Robert Interview, *supra* note 2.

144. Robert, *supra* note 20, at 3, 4.

145. These critical findings included that: "Three aquifers identified as the water table aquifer, the shallow aquifer and the Gonzales aquifer lie under the proposed site," "The shallow aquifer is hydrologically connected to the Mississippi River," "The water table aquifer is hydrologically connected to the Mississippi River," and "The shallow aquifer and the water table aquifer exhibit evidence of surface contamination." *Id.* at 4 (citing *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, Docket No. 243,970, at 2, 15-17, (La. 19th Jud. Dist. Ct. 1982)).

146. *Id.* at 3.

147. The "manifest error" standard derived from paragraph (6) of the Louisiana Administrative Procedure Act, which authorized reviewing courts to reverse agency decisions "manifestly erroneous in view of the reliable, probative

absurd.” The trial judge, obviously troubled by the record, found that the permit application was unlawfully incomplete but that in a Catch-22 for Irving, it became complete with evidence he had supplied during the proceedings.<sup>148</sup> The First Circuit Court of Appeals agreed.<sup>149</sup> A concurring judge, despite “misgivings” about the “dire consequences of error, accident or mismanagement,” wrote that to cast a negative vote “would constitute a substitution of my judgment for that of the Commissioners.”<sup>150</sup> There was only one appeal left.

Irving petitioned the Louisiana Supreme Court, whose decision even to accept the case was a crap shoot. Very few such writs are granted, and most are dismissed in summary fashion. The Save Ourselves writ was drawn to focus on what Irving saw to be the pivotal issue: that the ECC’s approval violated the state’s own plan requiring isolation from surface and subsurface waters.<sup>151</sup> The only evidence in the record signaled connection instead. Neither Irving nor any other counsel in the case could have predicted the decision that followed. The case landed on the desk of a justice who saw a larger issue.

#### IX. SAVE OURSELVES V. ENVIRONMENTAL CONTROL COMMISSION

The Supreme Court justices were troubled by the petition and held it for an unusual few weeks, trying to decide whether to accept or dismiss.<sup>152</sup> Finally deciding to consider the matter, the lot for drafting an opinion fell to James Dennis. Justice Dennis had written related opinions and had also written more widely on the Louisiana public trust doctrine, under which the state managed natural resources for the benefit of the people.<sup>153</sup> Dennis had been

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and substantial evidence on the whole record.” LA. REV. STAT. ANN. §49:964(G)(6) (2011).

148. *Save Ourselves, Inc. v. La. Env’tl. Control Comm’n*, Docket No. 243,970, at 2 (La. 19th Jud. Dist. Ct. 1982).

149. *See Save Ourselves, Inc. v. La. Env’tl. Control Comm’n*, 430 So. 2d 1114 (La. Ct. App. 1st 1983).

150. *Id.* at 1121 (Ponder, J., concurring).

151. Irving Interview, *supra* note 65.

152. Interview by Claire Yancey with Judge James L. Dennis in New Orleans, La. (Mar. 27, 2009) [hereinafter Dennis Interview]. Judge Dennis had subsequently accepted an appointment to the United States Fifth Circuit Court of Appeals. The background on Justice Dennis that follows is taken from this interview.

153. *See* James L. Dennis, *Capitant Lecture*, 63 LA. L. REV. 1003 (2003); James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1 (1994).

the kind of student who read Great Books of the World in law school simply to broaden his mind; he was also the kind of judge who read all the briefs and, often to the consternation of attorneys before him, did his own research and thinking as well. By coincidence, Dennis had been a delegate to the 1974 state constitutional convention where he had participated in drafting the new provision for environmental protection. All of these strands, the constitutional amendment, the public trust doctrine, and an independent legal mind, would come to bear on his consideration of the Save Ourselves appeal.

As would yet another circumstance. Dennis resided near Bayou Bonfouca in Slidell, Louisiana. An abandoned creosote plant left the bayou so contaminated that two Coast Guard divers, exploring the area, came up with second degree burns.<sup>154</sup> A follow-up report by the Army Corps of Engineers found bottom sediments at seven to eight percent creosote—lethal doses.<sup>155</sup> A neighborhood movement formed to have the creosote removed, and shortly thereafter, the St. Tammany Parish Policy Jury successfully petitioned the EPA to list Bonfouca as the thirteenth Superfund site in Louisiana.<sup>156</sup> Dennis kept himself removed from the politics, but he was quite aware of the controversy.<sup>157</sup> Toxic contamination was a serious problem.

As Dennis read into the record of the Save Ourselves proceedings, he was struck by the same evidentiary anomalies that were apparent to the lower courts—the site was connected, and contaminated—but he also saw state duties here more broadly than the specifics of its hazardous waste management plan.<sup>158</sup> Had he limited his analysis to the plan, had he overturned the I.T. permit for failure to follow it, the case would have been temporarily noteworthy and since forgotten. Instead, he turned to what he knew best, the constitution and the public trust.

The opinion opens by identifying state public trust obligations dating back to the 1890s and captured by succeeding Constitutions.<sup>159</sup> Environmental laws for hazardous waste management and establishing the ECC itself implemented these obligations to “maintain, protect and enhance a healthful and safe environment.”<sup>160</sup> The result was a “constitutional-statutory”

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154. Fontenot Interview, *supra* note 24.

155. *Id.*

156. *Id.*

157. Dennis Interview, *supra* note 152.

158. *Id.*

159. *Save Ourselves, Inc. v. La. Envtl. Control Comm’n*, 452 So. 2d 1152, 1154 (La. 1984).

160. *Id.* at 1155.

scheme in which the state acted as trustee for all the people.<sup>161</sup> The opinion then turned to the question of *how* it should do so.

Dennis had little guidance on trustee duties for this new thing before him—environmental law.<sup>162</sup> The briefs did not touch the subject. He began, then, to educate himself, as was his wont, by reading texts and seminal federal environmental opinions that had issued a decade earlier. The most analogous case he found was a recent decision of the federal appellate court in Washington, D.C.<sup>163</sup> interpreting the nascent National Environmental Policy Act (NEPA).<sup>164</sup> Dennis concluded that, as in that decision, government agencies had affirmative obligations to protect the public trust which went beyond evidence produced by the parties, in order to assure a proper decision.<sup>165</sup> Like NEPA, the Louisiana trust did not require absolute protection in a given case, but it did require a rigorous “balancing process” in which agencies had room for “a responsible exercise of discretion.”<sup>166</sup> Unstated, but implied, was the conclusion that an irresponsible exercise—such as negligence in examining major permits—was unlawful.<sup>167</sup>

Applying this principle to the facts, Dennis found that the ECC failed to do its homework on the most critical issues of the case. It did not even investigate water wells on the property, much less close them. It did not explore whether the clay liner intended to seal off the aquifers below would decompose from the heat of the toxics. It did not require an additional slurry wall around the pit, having identified the need for one. It did not limit, or even calculate, the number of waste pits that would be allowed on the 1000 acre property.<sup>168</sup> On the record, it was also impossible to know what alternative methods, sites or mitigation methods were examined, nor how the Commission weighed their pros and cons.<sup>169</sup> Under his analysis, Dennis did not have to decide whether the I.T. project violated the law. The Commission had violated the law instead.

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161. *See id.* at 1157.

162. Dennis Interview, *supra* note 152.

163. *Calvert Cliffs Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971). Also cited was *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608 (2d Cir. 1965).

164. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370H (2006).

165. *Save Ourselves*, 452 So. 2d at 1157.

166. *Id.*

167. This interpretation was consistent with Louisiana administrative law, Dennis found, which applied the highest “manifest error” standard to agency findings of fact, but a lesser “arbitrary” standard for its application of law. *Id.* at 1159.

168. *Id.* at 1160–61.

169. *Id.* at 1161.

There was no dissent. It was now 1984 and I.T. and the ECC would have to go back to the drawing board.

#### X. LINGERING DEMISE

No one knew what to do next. The ECC had no rules for a remand from the Supreme Court and was uncertain whether even to take new testimony or not.<sup>170</sup> I.T., of course, insisted that all that was needed were new findings, better addressing the weak spots in the record, with which courts would then have to concur, because they involved factual matters within DNR's expertise. Save Ourselves, of course, wanted to introduce additional evidence and to cross examine whatever the government or I.T. proffered; this was not in its opinion simply a question of faulty language but of fundamentally serious risks. The state, meanwhile, was under new management. Edwin Edwards had been elected to replace David Treen, but that did not necessarily signal the Governor's support. Although Edwards had selected I.T., he was also closely allied to Jefferson Parish and its heavyweight political establishment. His Secretary of the newly formed DEQ, Patricia Norton, was, anomalously, an environmentalist.<sup>171</sup> Stating that, "to me, it's a whole new ball game,"<sup>172</sup> she stalled. For two years, the matter went nowhere.

Finally, in 1986, Secretary Norton having been dismissed by Governor Edwards,<sup>173</sup> new hearings were scheduled. But then came a new complication: the federal waste permit contained different engineering and documentation from the original application six years before. Both permits were ordered to be consolidated, forming an enormous mound of documents, fact and

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170. Robert, *supra* note 20 at 4. The positions of I.T. and Save Ourselves here described are taken from this source, as well as the Irving Interview, *supra* note 36.

171. Norton, presented with the task of new hearings on the I.T. proposal, told the press, "To the extent that we can, we're for the environment." Tim Talley, 'New Game' Expected for I.T. Hearing, *MORNING ADVOCATE* (Baton Rouge), Apr. 22, 1986, at 3B.

172. *Id.*

173. In 1986, after receiving numerous complaints from neighbors of the Rollins hazardous waste incinerator in Baton Rouge, Norton made an unannounced visit to the facility; she found the furnaces at full throttle, the emissions thick and the control room operator passed out on the floor. She issued an emergency order for the facility to stop operations. The facility, at the time, was represented by Camille de Gravelles, who had been Governor Edward's law partner. Within days, Norton was dismissed from DEQ. Fontenot Interview, *supra* note 24.

law.<sup>174</sup> The DEQ, new leadership notwithstanding, gave notice of 75 deficiencies to be addressed.<sup>175</sup> The process was becoming unmanageable.

Another two years later the hearings finally came forward, before an administrative law judge who at one point confessed, “this is a case like no other. I think we’re making jurisprudence here.”<sup>176</sup> It was a messy business. With new witnesses, evidence, and claims that I.T. intended to sell the site, that the original permits had expired, and that new conflicts of interest had arisen, he eventually wound his way to a recommendation to deny the permit.<sup>177</sup>

The recommendation went to yet a new and different DEQ. By this time, Governor Edwards was out of office. Taking the helm at the Department was a well-known scientist from LSU, Dr. Paul Templet, who had been strongly endorsed by Louisiana environmental groups and chosen by the incoming Governor Roemer from a field of over 200 candidates.<sup>178</sup> Templet, reviewing the record, saw no other option than to deny the permit. There were many factors for him, including impacts on minorities and the Houma Nation site, but the dominant one was the hydrological connection with the Mississippi River.<sup>179</sup> “I didn’t think it could be fixed,” he said. “It wasn’t feasible, and they hadn’t proposed it—it wasn’t in the permit.”<sup>180</sup>

At last, I.T. threw in the towel. Templet saw the result from a regulatory point of view. New and substantial hazardous waste fees had driven down the waste business by raising the costs of disposal. “Companies had begun to realize that creating waste is expensive,” and, with a nudge from the state, were “becoming more efficient in how they operate.”<sup>181</sup> Irving offered a different reason.<sup>182</sup> I.T. had started out in the hazardous waste cleanup business and only later spread, with chronic difficulty and controversy, into the waste disposal business. Now, bogged down in Louisiana by the Burnside waste plant proposal, it rediscovered

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174. See Robert, *supra* note 20, at 4.

175. *Id.*

176. Tim Talley, *Cramer Named IT Hearing Officer*, MORNING ADVOCATE (Baton Rouge), Apr. 28, 1989.

177. Robert, *supra* note 20, at 5; Vicki Ferstel, *IT Site Foes Cheered by Finding*, MORNING ADVOCATE (Baton Rouge), Feb. 23, 1989, at 8A.

178. Interview by Claire Yancey with Dr. Paul Templet in Baton Rouge, La. (January 16, 2009) [hereinafter Templet Interview].

179. Templet Interview, *supra* note 178.

180. *Id.*

181. *Id.*

182. Irving Interview, *supra* note 36.

its roots. In September 1982, a freight train derailed near the town of Livingston, Louisiana, a short drive from Burnside.<sup>183</sup> It was a familiar Louisiana story; the engineer was apparently drunk and had turned over the engine controls to a female friend.<sup>184</sup> More than 200,000 gallons of toxic wastes poured out onto and into the ground.<sup>185</sup> I.T. was hired to remediate the mess for many millions of dollars. According to Irving, the lesson was obvious: there was more money to be made and far less headache in cleanup projects, which were never far away. Both men may have been right.

At last, Save Ourselves could stand down. From the time Ruby Cointment had first called Theresa Robert in her trailer, one child on her hip and another crawling the floor, ten years had passed. Few days over that period of time went by without some new development on the issue, a call from the press, or even a threat of retaliation. At one point, when the hearings were getting heated, Theresa and Al Robert feared for their lives.<sup>186</sup> Things happen in small rural communities, and this was a community torn between industry jobs and industry chemicals. Plant workers in the waste site corridor were told not to eat at The Cabin.<sup>187</sup> At another juncture, playing good cop, I.T. offered to buy 200–300 lunches from the restaurant as an incentive for the Roberts to back away.<sup>188</sup> Neither gambit worked. After an early setback, Theresa rallied the troops saying, “they’ve led people to believe that they’re here to stay but they haven’t got a permit yet and they haven’t actually bought the land.”<sup>189</sup> Ruby Cointment later told the press, “big business and big governments can often intimidate a man with a job, but they can never intimidate a woman with a child.”<sup>190</sup>

In retrospect, Theresa Robert gives all the credit to Steve Irving. He had “an environmental background,” she says, and “a tremendous understanding of politics; and when you’d look at something technical, he just had an unbelievable mind. He could sit there and read it, and just absorb it.”<sup>191</sup> Irving, in turn, credits

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183. Keitha Nelson and Robb Hays, *25th Anniversary of Livingston Parish Train Derailment*, WAFB.COM, <http://www.wafb.com/global/story.asp?s=7144530> (last visited Sept. 24, 2011).

184. Irving Interview, *supra* note 36. For a more recent accident of haunting similarity, see Jen De Gregorio, *Tug’s Pilot Jumped Ship to Visit Girlfriend at Time of Mississippi River Oil Spill*, TIMES-PICAYUNE, Oct. 22, 2008.

185. Irving Interview, *supra* note 35.

186. Robert Interview, *supra* note 2.

187. *Id.*

188. Fontenot Interview, *supra* note 24.

189. Albarado, *supra* note 71.

190. Pitts, *supra* note 33.

191. Robert Interview, *supra* note 2.

Theresa Robert.<sup>192</sup> As does Templet: “Without Theresa, there would have been no I.T. decision. She pulled that group together, whatever resources she needed to file suit . . . that’s how democracy is supposed to work.”<sup>193</sup>

All three may be right.

## XI. FALLOUT

The outcome of *Save Ourselves*, however improbable, is not the reason why the case had such a seismic impact on the state bureaucracy, the petrochemical industry, community groups, and corporate law firms. To be sure, a large hazardous waste disposal operation that could have become a nation-wide magnet was canceled, but many things are canceled in life and we continue with our routines. What the *Save Ourselves* opinion did was change the routine.

Following the decision, DEQ Secretary Templet applied its language in reaching his decision on the I.T. project, but did not reduce it to a formal process. That step came through a subsequent challenge to a solid waste permit by a neighboring landowner.<sup>194</sup> In *Blackett*, a court of appeals interpreted *Save Ourselves* to require a five-step inquiry: the avoidance of impacts, a balancing analysis, and consideration of alternative projects, sites and mitigating conditions.<sup>195</sup> *Save Ourselves* had announced the principle; *Blackett* spelled out the drill. A subsequent waste case went on to suggest a written basis for these decisions, summarizing the factors and the reasoning behind the agency’s choice.<sup>196</sup> In the following years, courts expanded the “I.T.” process to virtually all DEQ actions and the actions of similar agencies including the DNR and the Department of Wildlife and Fisheries.<sup>197</sup>

Not without controversy. For government functionaries, *Save Ourselves*’ requirements were a most unwelcome intrusion of the judiciary. From industry and development quarters, including

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192. Irving Interview, *supra* note 36.

193. Templet Interview, *supra* note 178.

194. *Blackett v. La. Dep’t of Env’tl. Quality*, 506 So. 2d 749 (La. Ct. App. 1st 1987).

195. *Id.* at 753–54.

196. *In re Rubicon*, 670 So. 2d 475 (La. Ct. App. 1st 1996) (recommending formal I.T. findings).

197. See Robert, *supra* note 20, at n.110 (citing *Lake Peigneur Pres. Soc’y v. Thompson*, No. 409,139 (La. 19th Jud. Dist. Ct. 1997), which applied the I.T. analysis to the DNR’s decisions); *Jurisich v. Jenkins*, 749 So. 2d 597, 604–05 (La. 1999) (applying the I.T. analysis to decisions by the Department of Wildlife and Fisheries); see also Robert, *supra* note 20, at 6 (discussing extension of I.T. analysis to virtually all DEQ decisions).



corporate law firms, came a storm of opprobrium: “infamous,” “overly burdensome,” and the imposition of “extra-legislative will.”<sup>198</sup> What these criticisms overlooked is that Justice Dennis simply asked the state to justify its decision. Similar plants better planned and located to minimize risks have since passed the “I.T. test” with flying colors.<sup>199</sup>

What the critics also overlooked is that Justice Dennis, in his decision, actually cut them considerable slack. The hazardous waste law under which the I.T. permit had been granted, and which Irving thought were his issue on appeal, required the state to “assure safe treatment, storage and disposal.”<sup>200</sup> The word “assure” in English dictionaries means more than someone’s opinion; it puts the burden on the state to prove that risks are minimal. Justice Dennis, focusing on other law, let this language slip, reducing the law’s potentially heavy burden of proof to, in effect, a constitution-based procedural review. The result was an opinion that reached more widely than the statute at hand, but with a lighter hand.

We may leave these reactions to others, however, because in 1997 state lawmakers bowed to the inevitable (*Save Ourselves* was, after all, decided on constitutional grounds) and enacted legislation requiring an amplified version of I.T. analysis for all DEQ hazardous waste and (major) pollution discharge permits.<sup>201</sup> Applicants would be required to prepare an “environmental review statement” that covered the I.T. principles, completing a conversation initiated by Justice Dennis ten years before.<sup>202</sup> While the new law placed responsibility for the statement with the proponent—rarely a recipe for candor or full-disclosure—it also specified that agencies were not “relieved” from their “public trust requirements” under Article 9 of the Constitution. Going forward, DEQ would remain holding the bag.<sup>203</sup> Many states, like the federal government, now make such reviews the backbone of their environmental policies.<sup>204</sup> Perhaps because the idea is so sensible,

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198. For a discussion of these criticisms, see Robert, *supra* note 21 at 7–10.

199. *Compare* N. Baton Rouge Env’tl. Ass’n v. La. Dep’t of Env’tl. Quality, 805 So. 2d 255 (La. Ct. App. 1st 2002) (I.T. compliance approved), *with In re* Waste Mgmt. of La., No. 492,277 (19th Jud. Dist. Ct. 2002) (I.T. compliance rejected).

200. LA. REV. STAT. ANN. § 30:2192(2).

201. LA. REV. STAT. ANN. § 30:2018.

202. *Id.* § 2018(A), (B).

203. *Id.* § 2018(H). The statement is also to be made available to the public when submitted, and to be made subject of a public hearing at the request of any individual. *Id.* § 2018(C).

204. Fifteen states have enacted legislation requiring environmental reviews of state and private development proposals. *See* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION §12:1 (2011).

it has stood the test of time. Who in the world could object to looking at the impacts of what you are doing before doing it? Who could object to the public looking, too?<sup>205</sup>

Government and industry could object when, as is quite common, they have a deal lined up in advance. They perceive themselves, with varying degrees of justification, as the experts, and the real offense of the I.T. requirements is that they give outsiders the right to question what they know. Worse, if the answers are not satisfactory, there may come a challenge in court.<sup>206</sup> This ghost does not sortie out of the closet very often. Few individuals or environmental groups have the resources to take on the government and private industry; the case at hand took ten years of people's lives. *Save Ourselves* did not usher in a flood of litigation. It hardly created a trickle.

Nor did the I.T. requirements convert agency personnel and industry permit applicants to a new, greener way of doing business. In practice, DEQ and other state agencies have largely reduced the process to a checklist sloughed onto permit applicants, who, like Research Associates, Inc., are hardly objective about the impacts of their own proposals. Louisiana corporations, led by the oil, gas, and chemical industry, continue to perceive environmental policy as a nuisance,<sup>207</sup> and Louisiana agencies continue to see these

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205. Public disclosure has been a tenet of American governance for more than a century, starting with the corporate income tax in 1909. See Marjorie Kornhauser, *Corporate Regulations and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 115–18 (1990) (the tax promoted, and reviled, for its “publicity function”). The corporate income tax led to the required disclosures as diverse as Securities and Exchange Commission registration statements and the Toxic Release Inventory of the Emergency Planning and Right-To-Know Act. 42 U.S.C. §§ 11001–50 (2006). According to industry representatives, the toxics inventory alone is powerful medicine. See *Chemical Industry Representatives, After The TRI Was Established*, WORLD WATCH, Nov/Dec 1995, at 9 (“[TRI] makes us more accountable to the public, and public accountability has made us smarter businessmen,” John Johnstone, Chemical Manufacturer’s Ass’n; “Quite frankly, we want to get off that list,” Joe Fallon, Slater Steels Corp.).

206. See *supra* text accompanying notes 110, 111. (I.T. and state officials offended by public intrusion into their decision-making); see also Robert, *supra* note 20, at 9, 10 (discussing criticism that “The public exerts too much influence on DEQ decisions.”). The resistance to outsiders intruding in one’s business is, of course, human and unavoidable. The proposition, however, that Louisiana DEQ, because of I.T. or any other requirement, favors the public over industry would find very few believers.

207. See the repeated attempts by the Louisiana Chemical Association to close the Tulane Environmental Law Clinic, which represents citizens and communities in the chemical corridor on pollution issues, in Adam Babich, *Controversy, Conflicts, and Law School Clinics*, 17 CLINICAL L. REV. 469 (2011).

corporations as their clients. Neighborhood and environmental groups are still “others” in the equation. We are still Louisiana.

This said, the importance of the I.T. requirements—or any environmental law requirements for that matter—does not stem from lawsuits filed to enforce them but, rather, from the fact that such challenges are possible. It is this possibility, and the unpredictability of their outcome, that have a magical, straightening effect. The more one hides unpleasant facts and bends the law, the more vulnerable to an I.T., insufficient-disclosure challenge a state permit becomes. On the other hand, the more one reveals about the knowns and unknowns of a dubious proposal, as the I.T. case itself demonstrates, the more its approval becomes suspect on the merits and body politic. The American experience is that disclosure can be powerful therapy.

In the end, the *Save Ourselves* court did not decide whether I.T. could build the world's largest hazardous waste facility on the Mississippi River at Burnside, Louisiana. It simply allowed affected Louisiana citizens to put the proposal to the test. At which point, the project failed. Today, the Burnside tract is occupied by a modest residential development called Pelican Point. Few pelicans travel this far up river, but no one is complaining.